Supreme Court, U.S.
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85-520

No.

IN THE

Supreme Court of the United States

October Term, 1984

JOHN B. HOLWAY,

Petitioner,

vs.

WARREN BURGER, BYRON WHITE, WILLIAM REHNQUIST, JOHN PAUL STEVENS, HARRY BLACKMUN, LEWIS POWELL JR, WILLIAM BRENNAN, SANDRA DAY O'CONNOR, RICHARD WILLIAMS, JAMES M SPROUSE, ROBERT CHAPMAN, JOHN BUTZNER JR, EDWARD SIMPKINS JR, LAWRENCE W I'ANSON, HARRY L CARRICO, ALBVERTAS S HARRISON JR, GEORGE M COCHRANE, ALEX M HARMON JR, RICHARD H POFF, A CHRISTIAN COMPTON, WILLIAM FRENCH SMITH, ELSIE L MUNSELL, THOMAS K BERGER, GERALD L BALILES, DENNIS G MERRILL, WILLIAM L WINSTON, ERNEST W BALLOU, MONTGOMERY KNIGHT JR, W THOMAS RICE, AND JOHN R ALFORD

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE FOURTH U.S. CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. Is judicial immunity sanctioned by the Constitution or laws of the United States? Or is it in direct and obvious violation of the Constitution Amendments 5, 7, and 14, the US civil and criminal civil rights statutes, and numerous rulings of this Court that "no man is above the law"?

2. Is it actually a privilege, given by judges themselves to themselves, and not a right conferred on them by the people, either through the Constitution or through act of Congress?

3. Are the U.S. Constitution, and all laws and treaties made under it, the supreme law of the land? Or do the long defunct English common law doctrines of divine right of kings and judicial immunity take precedence over them?

4. When an unconstitutional privilege clashes with a Constitutionally and legally guaranteed right, which one takes precedence?

5. Is judicial immunity a violation of international law, specifically the United Nations Declaration of Human Rights, and the Helsinki Accords?

6. Is judicial immunity, which is recognized by no other major democratic nation, an anachronism which sets US judges apart from their colleagues in Europe and North America, who are required to, and do, obey the constitutions and laws of their countries?

7. Is such an antiquated "doctrine" needed by any law-abiding citizen?

8. Does a judge or prosecutor who denies a citizen's right to bring a suit for fraud "knowingly and deliberately violate a constitutional right"? Is such a judge performing an action "normally performed by a judge"?

9. When a judge admits, through a motion to dismiss, his violation of the U.S. federal civil statutes, is he not also admitting violation of the virtually identical criminal analogue, for which no immunity exists?

10. Is the Executive Branch's defense of members of the Judicial Branch who admit serious torts and constitutional abuses a violation of 42 Code, section 1986? Does it also violate the Constitutional principle of separation of powers and checks and balances? Does it rob the public of its right to have such charges investigated and prosecuted instead of defended? In any event, is such tax-supported defense available to any official, of any branch, who admits his violations?

11. Does the alliance of judges and prosecutors suggest an obvious bargain, in which judges will not permit prosecutors to be sued in civil cases under "prosecutorial immunity;" in return prosecutors will refuse to prosecute judges under the criminal civil rights statutes?

12. Is the imposition of a punishment upon the innocent plaintiff, while protecting the admittedly guilty defendants, a violation of of the Constitution and of all concepts of fairness? Is it intended to have, and does it have, a chilling effect on resort to the courts to redress admitted wrongs?

13. Specifically, is awarding of attorney's fees to the United States government a violation of 42 US Code, section 1988?

14. When members of the Supreme Court, who are defendants in a suit, make a motion to dismiss their suit and to punish the citizen who brings it against them, are they putting obvious pressure on the lower court judge to grant their motion? Are they signalling that they will uphold on appeal any ruling in favor of their defense motion and will strike down any ruling denying it?

15. Should a judge recuse himself from a case involving as defendant a superior judge, who will review both this case and all his future cases? Is such a judge put in a situation where his independent judgment cannot be exercised or where his ruling will appear to be biased in favor of his superiors?

16. Should judges who are defendants in a ten-million-dollar civil suit recuse themselves from sitting in judgment of their own case?

17. Do all judges have a clear vested interest in their own immunity? Are they therefore unable to preside at such a suit without bias?

18. Should the judiciary refer the question of its own immunity from the Constitution and laws to an unbiased panel of distinguished non-judicial citizens? Is the US Congress the appropriate constitutional panel?

19. Should any judge who does not approve of the Constitution or the laws, and who

publicly declares that he will not obey them, not only recuse himself from a particular case but resign from the bench altogether, since to remain would be a violation of public trust and a repudiation of his own oath?

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PETITION FOR WRIT OF CERTIORARI TO THE FOURTH U.S. CIRCUIT COURT OF APPEALS

JURISDICTIONAL STATEMENT

The questions presented in this petition arise from a trial court judgment issued by the US Court for the Eastern District of Virginia as set forth in Appendix A, unpublished. A petititon for certiorari to the Fourth District US Court was filed on May 31, 1985 and was denied in an order dated June 28, 1985, as set forth in Appendix C, also unpublished. This petition has been filed within 90 days of that order. The Court's jurisdiction was invoked under Title 28 US Code, Section 1257 (3), and Title 28 US Code, Section 1332 (2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, ARTICLE SIX (in relevant part):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

UNITED STATES CONSTITUTION, AMENDMENT 5 (in relevant part):

> No person shall be ... deprived of life, liberty or property, without due process of law.

UNITED STATES CONSTITUTION, AMENDMENT 7 (in relevant part):

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved....

UNITED STATES CONSTITUTION, AMENDMENT XIV (in relevant part):

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any persons of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 US CODE, Section 242 (in relevant part);

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same...

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both...

18 US Code, section 242 (in relevant part):

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States... shall be fined not more than $1,000 or imprisoned not more than one year, or both...

42 US CODE, section 1981 (in relevant part)

All persons within the jurisdiction of the United States shall have the same right... to sue... and to the full and equal benefits of all laws... and shall be subject to like punishments, pains, and penalties.

42 US CODE, Section 1983 (in relevant part):

Every person who, under color of any statute, ordinance, regulation, custom, or

usage, of any State of Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for re-dress.

42 US CODE, section 1985 (in relevant part):

If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws... whereby another is injured in his person or property, or deprived of having and exercing anay right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 US Code, Section 1986 (in relevent part):

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects and refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may

be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action....

42 US CODE, Section 1988 (in relevent part):

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect.... In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title... the court in its descretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of their costs.

UNITED NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS (in relevant part):

Art. 7. All are equal before the law and entitled without discrimination to equal protection of the law.

Art. 8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or the law.

HELSINKI ACCORDS (Conference on Security and Cooperation in Europe: Final Act, Helsinki, 1975), in relevent part:

VII. *Respect for human rights and fundamental freedoms.*

In the field of human rights and fundamental freedoms, the participating States will act in conformity with the Charter of the United Nations and with the Univertsal Declaration of Human Rights. They will also fulfill their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound.

STATEMENT OF THE CASE

The case began in 1975, in a routine case in the District Court of Prince William County, Virginia, in a dispute over whether a landlord or a conditional seller had prior claim upon $42,000 worth of movie theater equipment abandoned by a debtor in default. Judge Percy Thornton presided. Holway, the present petitioner, claimed that, under the Universal Commercial Code and many other precedents, he, the conditional seller, had priority. The attorneys for the landlord presented a Virginia citation, *Mullins v Sturgill* (191 Va 625, 1951), purporting to show that the landlord had precedence. They showed it to Thornton, who leafed through the pages and put it aside. Holway, acting *pro se*, asked to see it. "You will be given an opportunity," Thornton replied. It is now ten years later, and Thornton has not yet given me that opportunity. He then ruled in the landlord's favor. When asked for a citation for his ruling, he replied, "Part of it is in the statute law, part is in the case law, and part of it is up here in my head." There is no such statute law, nor any such case law, and what might be "up there in Thornton's head" is anyone's guess.

Later, in looking up Mullins v Sturgill, Holway discovered that it said the exact opposite of what the attorneys quoted it as saying -- it in fact upheld the prior right of the conditional seller.

The attorneys knew the truth of Mullins, and Thornton knew the truth. Both made sure that I would not be allowed to read it.

I appealed, but under the rules of the Virginia Supreme Court, if a judge's error is not pointed out to him at the time he makes it, an appeal cannot succeed. I appealed to the US Supreme Court, which turned it down as not involving a federal question.

I called attention to the fraud -- it meets every test for fraud under Virginia's criminal code -- to the commonwealth attorneys of Prince William and Arlington counties (the attorneys practiced in Arlington), but was told blandly in both instances that such behavior is not a crime under the laws of Virginia!

I complained to the Virginia Bar, which conducted a secret investigation, to which I was not invited to testify. I was then informed that the conduct complained of is not considered misconduct under the rules of the bar!

I called for an official investigation by a three-judge panel, as required by Virginia law. Judge Selwyn Smith, Thornton's colleague on the district court, refused to conduct such an investigation on the grounds that he might later be required to sit in judgment of the case!

I lodged an official complaint to the Virginia Judicial Inquiry and Review Commission (who are among the respondants in the present case) and received a reply that such matters "do not come within the purview of this commission."

In a related case, involving another item of property in dispute, the case was heard by Smith. When I moved that all attorneys and myself be sworn to tell the truth, he angrily replied that "there is plenty of room in the jails" for me if I persisted in discussing lawyers' honesty in court. The landlords were allowed to state their case as plaintiffs as length, during which their attorney declared that his clients had spent $6,000 in their legal attempts to keep the property. He did not say to whom the $6,000 was paid. As I rose to begin presenting my defense case (I was technically the defendant in a motion by the landlord), Smith summarily stopped me and ruled for the landlord. This is believed to be the only time in the history of American jurisprudence in which a defendant was not allowed to defend himself.

I next took my charge of fraud under 42 USC, section 1983, to the US District Court for the Eastern District of Virginia, Albert Bryan Jr presiding. The defendants were the landlords, who were being charged with several counts of fraud outside of court in addition to the fraudulent Mullins citation. As I began to testify about Mullins, Bryan stepped in and ordered that no evidence could be given on that subject. He then summarily dismissed the jury and threw the case out for lack of evidence! (One juror passed me on the way out and whispered, "I think you got a railroading.")

I then sued Smith separately in the district court of Virginia, charging that he had violated my constitutional right to due process. Edward Simpkins, a retired judge, heard the case. Smith entered a motion to dismiss, admitting his violations but claiming immunity. Simpkins,

also one of the present respondents, explained to me that a motion to dismiss says, "I admit everything you say. So what?" He then granted the motion and dismissed the case.

I again appealed to the Virginia Supreme Court (whose members are also among the present respondents). They upheld Simpkins' ruling to dismiss the suit under judicial immunity.

My next move was to file a federal civil rights suit against the two original attorneys, plus the Bar official and the two commonwealth's attorneys who had condoned their fraud, plus Thornton, Smith, and Bryan. The Fifth, Seventh, and 14th Amendments to the Constitution, plus the various federal Civil Rights statutes, were cited as my cause of action. Because Bryan was a member of the court, I moved that the case be heard by a neutral court. Bryan's junior colleague, Richard Williams, denied the motion. I moved that the judge repeat his oath to uphold the Constitution. Williams denied that motion also. I moved that the attorneys be sworn to tell the truth, citing the written opinions of three defendants that lying by lawyers in court is not misconduct. Williams denied that also. The defendants all moved to dismiss the suit, admitting the allegations but pleading judicial and prosecutorial immunity. Williams granted their motion, even dismissing the suit against the attorneys, in violation of this Court's ruling, *Dennis v Sparks* (449 US 24, 1980), that attorneys who conspire with a judge to commit fraud do not share in his immunity.

Williams' ruling was appealed to the Fourth US District Court, which is presided over by Bryan's father. I moved to disqualify the court, saying that it would

be difficult to avoid the appearance of favoritism toward the defendant Bryan. The court then polled all the defendants except Bryan, who was thereby given the special status I had warned about. The other six however were unanimous that they wished the case to be reviewed by their co-defendant's father's court, which then announced the result of the poll, 6-1 against me. It therefore said it would not recuse itself and upheld the dismissal.

My appeal to the US Supreme Court was denied without explanation.

The present suit was then brought against 41 persons, including all the Justices of this Court plus retired Justice Stewart, the Attorneys General of the United States and of Virginia, and members of the Virginia Inquiry and Review commission, all of whom were charged with, and subsequently admitted, maliciously violating my civil rights. The suit is intended as a serious challenge to the concept of judicial and prosecutorial immunity.

The U.S. attorney representing the federal defendants, wrote to me that he will insist on all the rights his clients are entitled to under the Federal Rules of Civil Procedure. I replied that I also will demand that they receive all the rights they are entitled to and asked that they accord me all the rights I am entitled to under the Constitution. He did not reply.

The Commonwealth defendants, in their motion, cited the 11th Amendment to the Constitution as part of their defense. I wrote to their attorney that I too support the 11th Amendment and asked that in return they support the 5th, 7th, and 14th Amendments. He too did not reply.

In view of the history of this case, and the repeated insistance by lawyers and

judges that lying in court is not misconduct, I renewed my usual motions that the judge publicly repeat his oath to uphold the laws and the Constitution and that the attorneys (myself included as *pro se*) repeat an oath to tell the truth. I also moved that that the Eastern District of Virginia recuse itself from hearing the case, since, of its three members, one, Williams, was a defendant, and another, Bryan, the senior judge, had already been a defendant in a suit brought by me. I also pointed out that three other defendants were members of the Fourth Circuit Court of Appeals, to whom this, as well as all other decisions by members of the Eastern District must be submitted for review. (Williams had earlier said in court that he is very sensitive to having his opinions overturned by the Fourth Circuit.) Replying for the court, Bryan informed me that my motion was denied.

The defendants filed a motion, charging "harrassment" and asking that I be punished with a fine of some $2,000 attorneys fees. However, no charge of law-breaking was lodged against me.

A hearing was set for January 25. I arrived at the appointed hour to find my case at the top of the list posted on the door of Judge Bryan, who had conducted all the preliminary correspondence. No notice of the case was included on the list of any other judge that morning. I sat in Bryan's court, while he heard a long list of other cases. This did not surprise me, since the practice in every previous case had been to hold my case until last, after everyone else had left and no one remained in the room to hear what was to transpire. At noon Bryan announced an adjournment until the following Monday. I went home. The next day I received in the mail an

order from another judge, James Cachoris, denying all my motions and granting all the defense motions.

In his unpublished opinion, Cachoris said I was suing every judge wholesale merely because they had ruled against me. He did not say that every judge and other official who had been sued had been charged with constitutional and legal violations of the utmost seriousness -- and that every one had admitted the truth of the charges.

The order was appealed to the Fourth Circuit, again with a motion to move the case to a neutral court. Again the motion was denied, and the Fourth Circuit found that the suit against its colleagues had "no merit." The defendants, all of whom had admitted malicious violations, were let off with no penalties, while the punishment which they requested of their victim, whc was accused of no legal or other violations, was affirmed.

As in all the previous decisions relating to judicial law-breaking, the decision was not published.

WHY CERTIORARI SHOULD BE GRANTED

JUDICIAL IMMUNITY IS NOT SANCTIONED BY THE CONSTITUTION OR LAWS OF THE UNITED STATES. IT IS IN DIRECT AND OBVIOUS VIOLATION OF THE CONSTITUTION AMENDMENTS 5, 7, AND 14, AS WELL AS FEDERAL CIVIL RIGHTS STATUES, BOTH CIVIL AND CRIMINAL, AND NUMEROUS RULINGS OF THIS COURT THAT "NO MAN IS ABOVE THE LAW."

Far from "harrassing" the Respondents, this suit is a deliberate, serious, and well-thought out challenge to the antiquated, illegal, unconstitutional, undemocratic, un-American -- and unnecessary -- "doctrine" of immunity. It throws a shield of protection around 58,000 American judges and prosecutors, behind which they may -- and have -- safely committed fraud and gross violations of the public's civil rights.

It is important that this Court keep in mind why this case is before it and why it was not settled years ago in a manner consistent with the laws and the Constitution. A small town judge, Percy Thornton, together with two attorneys, clumsily tried to subvert the law, with blatantly fraudulent behavior in court. Later Thornton's colleague, Selwyn Smith -- for the only known time in the history of U.S. jurisprudence -- gaveled a defendant to silence and would not permit him even to begin his defense. Both assumed that a *pro se* litigant would not catch the violations and that, in any case, their friends among the judges and prosecutors of both the state and nation would rally to defend them if they were found out.

They were wrong on the first count but right on the second.

All should have been investigated and

their victim compensated promptly. Instead, all were adamantly defended, even after they admitted their wrongdoing, by every judge, prosecutor, and disciplinary body, some of whom argued that it is legal to commit fraud in court, and others of whom argued that it is permissible to do so, because he is a judge.

It is this systemic wrongdoing that is the most disquieting aspect of the case. It is not simply two isolated abberrant judges who violate citizens' rights in court; the entire legal process, including both judges or prosecutors, defends, condones, and thereby encourages, the violations. The tenacity, even vindictiveness, with which every judge and prosecutor rallies to expel the threat to their privilege, suggests that the need for immunity is pervasive throughout the bench and bar.

This case should have been disposed of early in accordance with the laws and the Constitution. Instead, it has been allowed to reach the point where the Justices of the Supreme Court themselves have admitted violations of the very rights the public looks to them to uphold. Learned attorneys and judges, who should have foreseen the dilemma, could not or would not face the problem with mature, constructive thinking. I had attempted to speak to the attorney for the federal defendants at an early stage, but he rebuffed my overtures.

However, it is still not too late to find a face-saving way to assert the sanctity and supremacy of the Constitution without embarrassing the members of this Court, either in their individual or official capacities. It is not my intention to embarrass this Court. I only seek to receive redress for the financial injury

which all Respondents acknowledge I have suffered illegally and unjustly, and to have the unconstitutional "doctrine" of judicial immunity put into the museum of judicial history, where indeed the English courts resigned it 234 years ago, to be followed by all the great democracies of western Europe and Canada. Under this pernicious and peculiarly U.S. "doctrine," there have been countless other victims in the past, who have been rebuffed by the courts after dishonest and malicious judges robbed them of their property and civil rights, then thumbed their noses at both their victims and the laws by claiming "immunity."

Only American judges, alone among major western democratic nations, still cling to immunity.

The solution is, quietly and with a minimum of publicity, to send the case back to the lower court for re-trial. At that point, a quiet out-of-court settlement can be negotiated -- you will find me a reasonable man in this regard. It is regrettable that Thornton, Smith, Judge Bryan Jr, and the others who let this case grow out of hand cannot be required to redress the wrongs they did and the injuries they caused, but that is apparently precluded, under *res judicata*, by the earlier decisions of this Court.

The important thing is to redress my wrong an to end all further such injustices by letting every judge and prosecutor know that from henceforth he must obey the law and the Constitution.

Judicial immunity is wrong, unfair, anachronistic, illegal, unconstitutional, un-American, and above all, unnecessary for any honest judge.

The wording of the Constitutional and statutory citations are unmistakably clear and admit no misinterpretation. Every

American has been guaranteed the *equal* protection of the law. Nowhere are the words "except judges" to be found. Indeed, never once has this Court quoted either the Constitution or statutory law to justify immunity. The only citation the judges have found to justify the self-serving "doctrine" is a 1607 English judge's ruling (*Barker's Case*, 77 Eng Rep 1305, Star Chamber).

For some four centuries before 1607, English judges had been liable to suits for corruption or negligence on the bench. Such suits were the recognized, often the only, form of appeal, and the basic principle of English law was the liability, not the immunity, of the judge (Feinman, Jay and Cohen, Roy, "Suing Judges," 31 SC L Rev 201, 1979. See also Pollock, F and Maitland, F, *The History of English Law*).

In 1607 that was abruptly changed, when a Judge Barker, who had presided at a murder trial and sentenced the defendant to death, was charged with conspiracy for his action. The jurist, Sir Edward Coke, made the revolutionary ruling that he could not be. Judges are appointed by the King and act in place of the King, Coke argued. The King is divine and can do no wrong, thus "royal judges are only to make an account to God and King" (*Barker's Case, supra*).

Any common law (that is, judges' law) can be overturned by Act of Parliament, and this anachronism was overturned less than 150 years later, in 1751, or 25 years before the American Revolution against King George and his "divine rights." The Justice's Protection Act of that year reasserted the pre-1607 traditional English doctrine of judicial liability for deliberate and malicious wrongs. This was the English law, and thus also the law in the ..merican colonies, at the time of

Bunker Hill and the American Declaration of Independence. There were few -- perhaps no -- American judges who had in their professional careers known anything except judicial liability.

Thus judicial immunity proved to be a relatively short-lived anomaly in the long course of English law. For four centuries, from Magna Carter to 1607, judicial liability had been the rule. For a century and a half, immunity had been the doctrine. For the last 234 years liability has again been the rule in England. It was reaffirmed by Parliament in 1848 and by the courts as recently as 1975 (*Sirros v Moore,* 1 QB 118). English judges today do not enjoy immunity for malicious acts, and apparently carry out their judicial duties perfectly well while obeying the same laws they administer.

What of America? In 1787, 55 delegates, including eight judges, met to write the US Constitution. They wrote into the document the common law provision for legislative immunity. This was a long-established tradition of English law, and its inclusion in our Constitution met with no opposition.

However, when James Madison rose to ask whether the American executive should have similar immunity, the other delegates, with memories of George III fresh in mind, scuffed the floor and stared at their shoes in stony silence. Madison looked around for an embarrassed minute or two and sat down. The question was never raised again (Eliot, *Debates of the Several State Conventions,* 2d Edition, 1941, vol 3). As one federal court commented more than a century later: Since legislative immunity was granted, the omission of executive immunity "cannot be ascribed to oversight" *(Halperin v Kissinger, 606 F.2d*

1192, 1979).

None of the delegates, including the eight judges, even dared to ask whether judges should have immunity. Democratic and egalitarian feelings were running high, and judges were particularly unpopular after the rash of foreclosures on the farms of Revolutionary veterans. Shay's Rebellion and the Whiskey Rebellion are dramatic evidence of how quickly in those days Americans snatched their muskets from the mantle piece for a cause. No less than executive immunity, the omission of judicial immunity "cannot be ascribed to oversight."

Still, Americans were worried. Thomas Jefferson warned that, under the courts, the Constitution may become "a mere thing of wax," to be twisted and bent as the judges choose. Patrick Henry, George Mason, Sam Adams, and others led the fight against the Constitution, which they conceived as a threat to individual rights.

The writers of the Constitution rushed to reassure them that this was not so. James Wilson told the Pennsylvania ratifying convention emphatically:

> What peculiar rights have been reserved to *any* class of men, on any occasion? Does even the first magistrate of the United States draw to himself a single privilege or security that does not extend to every person throughout the United States? (Eliot, *supra,* at 523)

In Federalist #77 Alexander Hamilton, another delegate, agreed that even the President is liable to "forfeiture of life and estates by subsequent prosecution in the course of common law."

And Charles Pinckney, a delegate from

South Carolina, declared:

> The convention well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary, and no more (*id*, 74).

The right to jury trial was another emotional point. As Henry declared:

> It prevents the hand of oppressison from cutting you off... Has not your mother country magnanimously preserved this noble privilege upwards of a thousand years?... Shall Americans give up that which nothing could induce the English people to relinquish? The idea is abhorrent to my mind (*Id*, at 32).

Hamilton (Federalist #83) agreed that both friends and foes of the Constitution were united on this principle. He called it "a defense against oppression" and "a barrier to tyranny of popular magistrates."

The debate in Virginia was spirited. Henry and Mason fought the Constitution because it contained no Bill of Rights to protect the people against arbitrary abuse of power.

Against their eloquence, no one dared raise a voice for immunity for judicial abuses. If anyone had, the Constitution might well have been defeated -- as it was, it passed by a close margin. If Virginia had rejected it, it is probable that the smaller states would have followed its lead, and I would now be a citizen of the Republic of Virginia, and the US Supreme Court would not even exist.

As soon as the Constitution was rati-

fied, the Federalists kept their promise and passed the Bill of Rights, including the Fifth Amendment, with its "due process" clause (does "due process" include freedom from judicial fraud and the right to defend oneself?) and the Seventh Amendment, guaranteeing the right of jury trial in *all* cases over $20. It did not say, "unless the defendant is a judge."

The principle of equal rights for all, special privileges for none, is also enshrined in the Virginia Constitution's Bill of Rights, the very first article of which says

> 1. **Equality and rights of men.** All men are by nature equally free and independent, and have certain inherent rights...

In an explanatory note, the constitution adds:

> An act is not invalid if within the sphere of its operation, all persons subject to it are treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.

The Virginia Bill of Rights goes on to add:

> 4. **No exclusive emoluments or privileges.** No man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community... neither ought the offices of magistrate, legislator, or judge to be hereditary.

By including judges in the same para-

graph, the drafters made clear that they specifically intended them to be included in the meaning of the article. Thus it is difficult to justify Judge Edward Simpkins' dismissal of his state's constitution with an airy, "So what?"

The US Constitution, Article 6, says specifically that it and all laws and treaties made under it shall be the supreme law of the land, "and the judges in every state shall be bound thereby."

Sixteen years after he had voted to ratify the Constitution, John Marshall, by then Chief Justice, re-stated the principle in his landmark decision, Marbury v Madison:

> The framers of the Constitution contemplated that instrument as a rule for the government of *courts*, as well as the legislature. Why otherwise does it direct the judges to take an oath to support it? How immoral to impose it on them, if they are to be used as the instruments, and the knowing instruments, for violating what they swear to support...
>
> To what purpose are powers limited, and to what purpose is that limitation committed to writing, if those limits may, at any time, be passed by those intended to be restrained?
>
> A law repugnant to the Constitution is void; and *courts*, as well as other departments are bound by the instrument (emphasis in original).

Yet even as Marshall wrote, judges in North Carolina were making the first break from American -- and English -- law. That

same year the members of its supreme court conferred absolute immunity on themselves and their fellow judges. New York judges followed in 1810. One by one, judges in a few other states quietly dusted off the ancient, and repudiated, immunity doctrine, which had been thrown out in both England and America before they had been born. By 1868 judges in 11 states (Alabama, Arkansas, California, Delaware, Massachusetts, New Hampshire, New Jersey, Virginia, and Wisconsin) had also declared immunity for themselves, even for the most malicious acts.

Judges in six other states (Illinois, Indiana, Iowa, Kentucky, Maryland, and South Carolina) had given themselves a qualified immunity, subject to a showing that the act was done in good faith and without malice.

(Connecticut had also made a ruling, but it was ambiguous.)

In the other 19 states, or more than half of the 37, judges enjoyed no immunity. In nine states the issue had not reached the courts. Presumably the judges there had conducted themselves with fairness and dignity and had not brought any suits down upon themselves.

In the other ten, the issue had reached the courts, but the judges had declined to give themselves outlaw privileges. (Barth, Douglas K, "Time for a Qualified Immunity?", 27 Case Western L Rev 742, 1971).

Thus courts in more than half the states recognized no judicial immunity of any kind, and 70 percent -- 26 states -- rejected absolute immunity for malicious acts.

In no state was immunity granted by the legislature or by the constitution.

The Civil War spawned a rash of congressional laws to protect the newly freed

slaves, where courts were refusing to enforce their rights.

The first was the Civil Rights Act of 1866 (18 US Code, section 242), imposing criminal penalties on judges and others -- "whoever" violate the civil rights of citizens. The sponsors said specifically that judges would be liable if they acted "knowingly, viciously, or oppressively, in disregard of a law of the United States." President Andrew Johnson vetoed the bill because he objected to its application to judges, but Congress came back and overrode his veto by a two-thirds vote (Kates, Don B, Jr, "Immunity of State Judges," 65 Northwestern L Rev 621, 1970.)

Meanwhile, the 14th Amendment passed both Houses and three-fourths of the state legislatures and was proclaimed officially in July 1868. It required, among other things, due process of law and the equal protection of the laws.

That same year, the Supreme Court gave Congress its reply. For the first time addressing the problem of judicial violations of citizens' rights *(Randall v Brigham,* 74 US 523, 1868), it enunciated a doctrine of qualified immunity.

Congress and the courts continued on their divergent paths in the field of civil rights. In 1870 Congress passed another Civil Rights Act (42 USC, section 1981), which says:

> *All* persons within the jurisdiction of the United States shall have the same right... to sue... and to the full and equal benefits of all laws... and shall be subject to like punishments, pains, and penalties (emphasis added).

The law was enacted "primarily, if not

exclusively, to control the behavior of state court judges" (Kates, *supra*).

A year later Congress passed the Ku Klux Klan Act (42 US Code, section 1983), providing civil remedies for victims of civil rights violations. The Act's language is almost identical to the 1866 Act providing criminal penalties. Where the earlier statute had said "whoever," the 1871 Act said "every person."

Every speaker in the debate, both supporters and opponents, made clear that the Act was aimed at judges, who along with other state officials, were refusing to enforce the 14th Amendment.

Opponents called the bill "a sword of Damocles hanging over the head of every judge in America."

Senator Thurman: "There have been two or three instances already under the (earlier) civil rights bill of state judges being taken into Court, sometimes under indictment for offense. Is (this bill) intended to perpetuate that? That is the language of the bill."

The supporters replied that Thurman was correct.

Congressman Rainey of South Carolina declared that "the courts are in many instances under the control of those who are wholly inimical to the impartial administration of justice."

Congressman Beatty of Ohio: "It is the duty of Congress to listen to the appeals of those who by reason of "bribed judges cannot obtain the rights and privileges due an American citizen."

Senator Osborn: "Justice is mocked, and crime defiant in the hall of justice."

Congressman Platt: "Judges have become 'little Kings,' with almost despotic powers." (Cong. Globe, 39th Congress, 1st session 475-6, 1154-50. See also Kates).

After all the debate was over, both Houses approved the bill. President Johnson again vetoed it, and the House and Senate again over-rode the veto. The intent of Congress could not have been more clear. Wrote Justice William O Douglas almost a century later:

> Every member of Congress who spoke on the issue assumed that the words of the statute meant what they said and that judges would be liable L²½½ G½x ³ ¦ € 4½ O₪ 366 US 547, 1967).

Even as this debate was raging in the Capitol, the Supreme Court, in its chambers in the basement, was delivering its reply. In Bradley v Fisher (80 US 35, 1871), the Court expanded its Randall ruling. Now, it declared, judicial immunity extended to all judges, including those who had committed malicious or corrupt acts. The timing could not have been more clear. The Court was deliberately defying Congress.

The Randall opinion had been unanimous. Now however two Justices balked. They could not agree to immunity for malice and corruption, they said, but they were overruled.

Justice Stephen Johnson Field, who wrote both opinions, made the amazing statement that

> The principal (of judicial immunity) obtains in all countries where there is any well ordered system of jurisprudence. It has been the doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country (ibid, p 347).

Justice Field's statement was untrue on all three counts. Yet in the intervening century, his argument has been quoted approvingly and uncritically by judges seeking to justify immunity. It is time that these untruths be replaced by the truth:

1) Judicial immunity does not, and did not then, obtain in all other countries with "well ordered systems of jurisprudence." Today it obtains in only one major western democracy, the United States.

2) It had not been the doctrine in English courts for centuries. It had been tossed out by the British more than a century before Fields wrote.

3) In less than half the states in the United States had judges given themselves any immunity. In more than two-thirds, absolute immunity was unavailable.

The Supreme Court had waited 81 years, 1787-1868, to proclaim that it would not obey the Constitution. It waited 96 years, 1871-1967, before it declared it would not obey Congress either. In *Pierson v Ray, supra),* it ruled that the words of the Ku Klux Klan Act, "every person," applied to every *other* person, not to judges.

It repeated Fields' original citation of English common law, the only instance I am aware of in which a foreign law -- the Napolenic Code, Canon law, Talmudic law, the Code of Hammurabi etc -- has been elevated above the US Constitution.

The Court declared that the words "every person" did not apply to judges.

Douglas dissented. "To most," he wrote, "'every person' would mean *every person,* not every person *except* judges" (emphasis in original).

He agreed that judges should be protected from honest mistakes,

> But that is far different from saying that a judge shall be immune from the consequences of any of his judicial acts, and that he shall not be liable for the knowing and intentional deprivation of a person's civil rights.

The Court also ignored the voluminous legislative history and declared that if Congress had intended to include judges, it would have mentioned judges specifically, instead of saying "every person." By this logic, since the Act does not mention bus drivers or electritions specifically, it does not include them under the rubric of "every person" either.

The reverse of this argument has more validity. If Congress had wanted to *exclude* judges, it would have said so specifically. Indeed, this is the same reasoning tht Justice Harry Blackmun and a majority of this Court employed in 1984 in awarding attorney's fees in cases of injunctive relief against judicial civil rights violations (*Pulliam v Allen*, Supreme Court 82-1432).

In 1978 Congress specifically provided immunity to diplomats (22 USC 254). The fact that it has not taken similar action in regard to judges says eloquently that it has deliberately chosen not to.

As recently as 1982, that congressional philosophy was re-stated by Senator Howard Metzenbaum. As quoted by the Washington *Post*, Metzenbaum declared:

> It is unwise and contrary to our basic democratic principles to create classes of individuals or businesses who are above or outside the law ("The Monopoly Game," Washington *Post*, September 12 1982, page B-5.

The result of immunity has been predictable: It has spawned evil judges. Their civil rights violations include:

Sterilization of a girl without her knowledge or legal representation (*Stump v Sparkman*, 435 US 349, 1978);

Using the judicial process to further a private collection business (*Huendling v Jensen*, 168 NW 2d 745, 1969);

Disbarment of an attorney without trial (*Bradley v Fisher, supra*);

Denying the right to bail (*Grundstrom v Darnell*, 531 F.2d 272, 1976);

Holding a defendant in contempt for refusing to answer self-incriminating questions (*Berg v Cwiklinski*, 416 F.2d 929, 19690.

Malicious prosecution, false imprisonment, slander (*O'Brien v Chandler*, 352 F.2d 987; see also *Ravenscroft v Casey*, 139 F.2d 776, 1944; *Stahl v Currey*, 135 Ohio St 253, 1939; *Garfield v Palmieri*, 297 F.2d 526, 1962);*Johnson v Moorman*, 80 Va 131, 1885; *Berry v Smith*, 148 Va 424, 1927);

Hauling a coffee vendor to court in handcuffs because the courthouse coffee tasted bad (*Zarcone v Perry*, 527 F.2d 52, 1978);

Locking up a deaf, elderly man who didn't hear an order to get out of the way (*McAlester v Brown*, 469 F.2d 1376, 1975);

Imprisonment of a citizen unable to pay a court-appointed lawyer (*Jacobson v Schaeffer*, 442 F.2d 1274, 1974);

Imprisoning a citizen as an alien for 18 months (*Gregoire v Biddle*, 177 F.2d 272, 1949);

Sending a feeble-minded boy to prison for 11 years without a hearing (*Francis v Crafts*, 203 F.2d 809, 1953);

Arresting a tenant at gunpoint, locking him up at midnight, having a friend sign a

blank complaint, charging the man with petty theft, forging his signature on a guilty plea and waiver of jury trial, arraigning him, convicting him, and sentencing him to jail, while the man was locked in a cell (*Lopez v Vanderwater,* 620 F.2d 1229, 1980);

Telling a 13-year old Mexican boy, "You are lower than an animal.... You belong in prison for the rest of your life. You ought to commit suicide.... Just miserable, lousey, rotten people. Maybe Hitler was right. The animals in our society probably ought to be destroyed.... You are going to have to make up your mind whether you are going to observe the law or not. If you can't observe the law, then you have to be put away" (Quoted in Kates, Don B. Jr., "Immunity of State Judges," 65 Northwestern L Rev 621, 1970).

This can only be a partial list. How many more examples are hidden from public view, as my case is, in unpublished opinions regarding judicial law-breaking? How many others never reach court because lawyers are afraid to take such cases? Or from a fatalistic belief that justice is unavailable when the wrongdoer is a judge?

Ironically, in 1879, 11 years after conferring immunity on itself, the Supreme Court began chipping away at executive immunity, beginning with *Ex parte Young* (209 US 123, 1879).

In 1882 the Court issued its most eloquent ruling against the immunity defense. In *US v Lee* (106 US 196, 1882), it proclaimed:

> No man in this country is so high that he is above the law. No officer of the law may set the law at defiance with impunity. all officers of the government, from the

> highest to the least, are creatures of the law, and are bound to obey it.

This philosophy was reaffirmed in 1959 in *Barr v Mateo* (360 US 564), in which an unconstitutional act was declared to be "without authority" and "illegal", and the officer attempting to enforce it was made liable for the consequences. Wrote Justice William Brennan: It would be "monstrous" to let a citizen who has been wronged, even with the worst motives, go without remedy.

In 1971 in *Bivens v Six Unknown Narcotic Agents* (403 US 388), the Court quoted approvingly from Marbury v Madison that "the essence of liberty" is the right of every individual to claim the protection of the laws. Justice William Brennan also quoted US v Lee that "No man in this country is so high that he is above the law." He quoted the Civil Rights Act of 1871 and added:

> There is no immunity for officials who act with malice or who knew, or reasonably should have known, they were violating the Constitution. If all officials were exempt from liability, it would seriously erode the protection provided by the basic constitutional guarantees. The courts do not purport to protect an official who has... violated those fundamental princples of fairness embodied in the Constitution....
> Our system of jurisprudence rests on the assumption that *all* individuals, *whatever* their position in government, are subject to federal law.... If all officials were exempt from liability, a suit under the Constitution would provide no redress for

> the injured citizen nor deter officials from committing more constitutional wrongs....
> This Court has never purported to grant immunity of any kind to any official who has manifestly overreached his authority or wrongfully exceeded clear constitutional or statutory aluthority. Official immunity is utterly unavailable when a government figure has wandered completely off the official reservation...
> There are well established and unambiguous constitutional limitations on powers.... A federal official may not with impunity ignore them....
> Absolute immunity for federal officials who knowingly and deliberately violate constitutional rights is contrary to the course of decisions in this Court from the very early days of the republic.

In 1974 the Court stripped immunity from state governors in *Scheuer v Rhodes* (416 US 232).

Four years later the Court took immunity away from Cabinet officers in *Butz v Economou* (438 US 478, 1978). Secretary of Agriculture Earl Butz had argued that his ruling against Economou Grain company was a judicial act entitled to judicial immunity. Writing for the majority, Justice White rejected this, saying Butz had gone "manifestly beyond the line of duty" and "exceeded constitutional limits." He said absolute immunity for officials

> who knowingly and deliberately violate constitutional rights is contrary to the course of decisions in

> this Court from the very early days of the republic.

It added that there are "well established and unambiguous constitutional limitations on powers," and officials "may not with impunity ignore them."

In 1979 another Cabinet officer, Secretary of State Kissinger, asked for immunity (*Halperin v Kissinger,* 606 F.2d 1192, 19790). The federal court said qualified (not absolute) immunity for constitutional violations

> is mandated by the tradition of equal justice under law.... Absent exigent circumstances, there can be no appeal to powers beyond those enumerated in the Constitution.

The court quoted US v Lee that "no man in this country is so high that he is above the law." It noted the Supreme Court's rulings that there is no immunity for officials who knowingly violate the Constitution and said:

> The President, like all citizens, must be held to know the relevant law. Like every other citizen charged with knowledge of the law, he must be held accountable for personal misconduct.

VIOLATIONS OF THE CONSTITUTION AND THE CIVIL RIGHTS LAWS SHOULD NOT BE CONSIDERED ACTIONS "NORMALLY PERFORMED" BY A JUDGE

While denying immunity to governors and Cabinet officers, the courts were putting only minimal restrictions on judges.

In 1974 a federal court in Texas ruled that a judge may not with impunity punch a

citizen in the nose while sitting on the bench, conceding that assault and battery is a violation of civil rights (*Gregory v Thompson*, 500 F.2d 590).

In 1985 several Chicago judges were prosecuted (though not sued) for fixing traffic tickets.

Thus punching a citizen and fixing a parking ticket are not permissible under judicial immunity, but committing fraud and violating civil rights are.

In 1978, in *Stump v Sparkman* (435 US 349), the Supreme Court laid down two rules to define what judicial conduct is covered by immunity:

1) Is it correctable on appeal?

2) Is it an action "normally performed by a judge?"

As Justice Potter Stewart said:

> The conduct of a judge surely does not become a judicial act merely on his own say-so. A judge is not free, like a loose cannon, to inflict indiscriminate damage.

The Stump court held that it is not the title of judge which provides the immunity but the judicial act. The act, not the actor, determines immunity, it said.

In practice however, the courts apply immunity to the actor, that is the judge, not the act. Except for nose punching and ticket fixing, immunity has not been witheld from any judge for his action on the bench, no matter how corrupt or malicious. But it has been witheld from non-judges such as Butz, who claimed to be performing judicial acts.

In 1974 a school board pleaded judicial immunity for a decision affecting student rights. This Court dismissed the argument and held the board liable (*Wood v Strickland*, 420 US 308). A prison parole board which raised the same defense was also

struck down (*Mack v Johnson*, 430 F.Supp. 1139, 1977).

As the present case illustrates, judicial violations of the Constitution and the civil rights laws -- including fraud or refusal to let a defendant defend himself -- were not correctable on appeal.

In order to claim immunity, the defendants must also argue that violating the Constitution and the civil rights laws is an action normally performed by a judge. Alas, this may be a valid defense. All the judges in this case have admitted doing so. They have apparently done it casually, without a second thought. Perhaps the nation's other 28,000 judges also violate the law and the Constitution just as casually in the normal conduct of their office. This Court may have knowledge of how widespread is malicious and corrupt law-breaking among the judiciary and whether it is in fact "an action normally performed by a judge" in America. It is not normal in other countries.

THE ARCHAIC CONCEPT OF ABSOLUTE JUDICIAL IMMUNITY IS RECOGNIZED BY NO OTHER MAJOR WESTERN DEMOCRACY. IT PUTS THE UNITED STATES IN VIOLATION OF INTERNATIONAL LAW, SPECIFICALLY THE U.N. DECLARATION OF HUMAN RIGHTS AND THE HELSINKI ACCORDS

The United States is the only country in the world whose judges not only still bewlieve in the Divine Right of Kings but claim it for themselves!

As we have seen, Britain gave up absolute judicial immunity 234 years ago. I have letters (see Appendix) from legal authorities in 11 other major democracies in Europe and Canada, asserting that their judges also do not enjoy absolute immunity. The countries are: France, West Germany, Italy, Belgium, Portugal, Switz-

erland, Sweden, Norway, Denmark, and Canada. Even Communist Hungary does not grant immunity to its judges.

Canada and the other Commonwealth nations followed Britain's lead.

In France, judges of all but the highest civil court are liable both under the Penal Code and the Civil Code. Civil wuits may be brought for "fraud, intentional wrongful conduct or gross professional negligence" (Barth, *supra*).

In Switzerland judges may also be sued, although in some cantons it is necessary to get permission from the cantonal parliament first (letter dated April 18, 1983 from Dr. Jurg Leutert, legal advisor of the Swiss embassys, to John B. Holway).

Under Finland's Constitution Act, section 93, judges have no immunity and may be sued for damages or on criminal charges, or both (letter from Dr. Irma Lager, University of Helsinki Faculty of Law, to John B. Holway).

As Okatar Pritsch, Vice Consul of the West German embassy in Washington, writes:

> The Basic Law guarantees the independence of the judges. Article 97, para. 1 says: "The judge shall be independent and subject only to the law." This means that the judge is independent of the executive and legislative organs... Only when the judge is subject to the law can he be independent without his independence being transformed into despotism (Letter to John B Holway dated November 18, 1982).

I have been able to learn of only one small European democratic country in which judges enjoy immunity -- the Netherlands, which grants it by act of the legislature.

Judges in all the other countries carry out their duties while themselves obeying the same laws that all citizens in their courts must obey.

Judicial immunity also puts the United States in violation of international law, specifically the United Nations Declaration of Human Rights, as well as the Helsinki Accords, which require its signatories to observe the Declaration.

Our State Department is fond of pointing out that the constitutions of the Soviet Union and Poland, among others, are models of protection for civil rights but that the courts in those countries do not enforce the rights that look so good on paper. Alas, the same statement is true of our own courts as well.

THE PRACTICE OF THE EXECUTIVE BRANCH DEFENDING JUDGES ACCUSED OF SERIOUS LAW VIOLATIONS AND CONSTITUTIONAL ABUSES VIOLATES THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS. IT PROVIDES JUDGES WITH UNCONSTITUTIONAL, ILLEGAL, AND UNDEMOCRATIC PROTECTION FOR THEIR WRONGDOING AND ROBS THE PUBLIC OF ITS RIGHT TO HAVE SUCH WRONGDOING PROSECUTED, NOT DEFENDED.

In 1927 and 1976 the Court took two other steps to protect judges, by extending immunity to prosecutors as well. It ruled (*Yaselli v Goff*, 275 US 503, 1927, and *Imbler v Pachtman*, 424 US 409, 1976) that prosecutors accused of "willfully, maliciously, and corruptly introducing a great mass of false, misleading, and hearsay testimony and evidence" to get a murder conviction are also immune!

Assuming that the number of prosecutors roughly equals the number of judges (28,000), there are now some 56,000 Ameri-

can outlaws who claim they do not have to obey either the laws or the Constitution. That's enough people to populate a small city or fill a large football stadium.

Significantly, the only Cabinet officer exempt from the Court's general stricture against executive immunity is the Attorney General.

The 18th century philosopher, Montesquieu, had warned that "there is no liberty... if the power of judging be not separated from the legislative and executive powers."

The framers of the Constitution agreed emphatically. Madison, in Federalist #47, called it "the very definition of tyranny:"

> Were the power of judging joined with the executive power, the *judge* might behave with all the violence of *an oppressor* (emphasis in original).

Hamilton, in Federalist #78, wrote:

> There is no liberty, if the power of judging be not separated from the legislative and executive powers... Individual oppression may now and then proceed from the courts of justice (but in general), liberty would have nothing to fear from the judiciary alone. (However) it would have everything to fear from its union with either of the other departments.

Virginia Bill of Rights, Article 1 of the Virginia Constitution, section 5, says

> The legislative, executive, and judicial departments of the Commonwealth should be separate and distinct.

As this Court ruled in 1978 (*Butz v Economou, supra*):

> *Unlike a judge,* officials of the Executive Branch would face no conflict of interest if their legal representation were provided by the Executive Branch (emphasis added).

Prosecutorial immunity gives the prosecutor a vested interest in protecting the judges' immunity, since his own is bound up with it. Far from prosecuting judges, the US Attorney General and the attorneys general of 44 states actually *defend* judges who are accused of, and who admit, breaking the civil rights law, even though this is also a crime under two United States Codes (Title 18, sections 241 and 242. Although judges have not yet given themselves immunity from criminal prosecution, they can safely plead guilty to crimes, knowing that their defense lawyers, who receive the judges's protection from civil suit, will in return protect judges from criminal prosecution.

The present case is a perfect example. The U.S. Attorney General is a co-defendant with 14 federal judges, and like them has admitted behavior which is in violation of these criminal codes. Of course he has refused to prosecute either himself or them.

When I pointed this out to the assistant U.S. attorney representing the defendants, he replied that Congress has mandated executive defense of the judiciary. However, he refused to divulge which statute mandated it. At any rate, surely the "right" of a judge, or any other official, to receive free tax-payer supported legal counsel ends when the official admits his wrongdoing.

The District of Columbia and six states -- Pennsylvania, Texas, South Dakota, Kansas, Montana, and Hawaii -- understand the conflict of interest and do not allow their attorneys general to protect judges accused of violating the law.

It is an excellent precedent for the federal government and all the states to follow as well.

PUNISHING THE INNOCENT PLAINTIFF WHILE PROTECTING THE DEFENDANTS WHO ADMIT THEIR LAW-BREAKING IS ARBITRARY, VINDICTIVE, AND OBVIOUSLY INTENDED TO DETER CITIZENS FROM BRINGING CIVIL RIGHTS SUITS AGAINST MEMBERS OF THIS COURT. IT IS ALSO IN VIOLATION OF THE CONSTITUTION AND CIVIL RIGHTS STATUTES.

It is difficult to believe that the members of this Court were consulted by their attorney before he made the motion in their names for the award of attorney fees to him. It smacks of bullying.

It is alsc in clear violation of 42 US Code, Section 1988.

I shall quickly pass over the irony that I, as a tax-payer, am already paying the U.S. attorney to violate my rights. Much better that our tax money be spent to defend our rights than to violate them.

But there is another irony that I do wish to point out:

Of the 42 principals in the case -- 41 defendants plus myself as plaintiff -- I am the only one who has not broken the law, has not been accused of breaking the law, and has not admitted breaking the law. All 41 of the defendants have been accused of violating the law and the Constitution and all have so admitted.

The admitted law-breakers are thus seeking to punish their admittedly inno-

cent victim.

They say they are doing so because they are being "harrassed." (Every defendant in every court case feels he is being harrassed.)

This can only be called vindictive, illegal, and obviously intended to have a chilling effect on all citizens who claim injury and come to court asking to have the Constitution and laws upheld there. One would expect this in a court in Poland but not in the United States.

No citation is offered, no statute quoted, which covers the offense of "harrassment."

But, as the U.S. attorney, as well as every judge, knows, U.S. Code Title 42, Section 1988 plainly forbids the award of attorneys fees to the U.S. government. By making an illegal motion in the name of the members of the Supreme Court, the attorney has embarrassed this Court and its members individually.

The motion for an injunction against further suits under the Constitution is likewise unconstitutional and illegal. It seeks to immunize in advance the attorney who made the motion, the defendants in whose names it was ofered, and and the judge who granted it, and it is a tacit admission that they themselves realize the illegality of their motion.

It should be struck down as an obvious violation of the clear language of the statute.

There is a better way to prevent all future suits anyway. That is to cut through the pattern of law-breaking which has characterized the behavior of every judge and attorney who has touched the case so far. As soon as the law and the Constitution are enforced, as they should have been from the very outset, all further litigation will be unnecessary.

A JUDGE SHOULD RECUSE HIMSELF FROM HEARING A CASE INVOLVING A CLOSE COLLEAGUE OR INVOLVING MEMBERS OF A SUPERIOR COURT WHO MUST REVIEW THE RULING, AS WELL AS ALL OTHER OPINIONS OF THE JUDGE.

What judge can withstand the pressure of a motion made by defendants who are at the same time members of the United States Supreme Court? A motion from such a source must appear more a command than a motion. At the very least, it signals the judge in unmistakable terms that the defendants will uphold any ruling which grants their motion and will strike down any ruling that is in opposition to it. Under such circumstances, an unbiased decision is impossible.

That is also true if the defendants also include senior members of the trial judge's own court, as well as members of the next superior court, which regularly review his opinions.

In an obiter dictum in another case, while waiting to hear my case, Judge Richard Williams told one of the attorneys that, as a new judge, he was very sensitive to having his opinions overturned by the Fourth Circuit. I thus moved that the present case be heard by a court which does not have its opinions reviewed by the Fourth Circuit, whose members are defendants. I also pointed out that one member of the Eastern District of Virginia court, Williams, is a defendant, and the chief judge of that court, Bryan, is a former defendant in a suit brought by me. By rejecting my motion, Bryan put Judge Cachoris, the most junior member of the court, in an awkward position, making it extremely difficult to hand down an unbiased ruling.

The cause of justice would have been

better served if my motion had been granted. It would have avoided the appearance of favoritism and would have insured that the court's decision would be made without coercion, either overt or implied. Protecting the judge's independence is the rationale most often cited to justify judicial immunity. Surely that independence was compromised far more in the present case.

A JUDGE HAS A DUTY TO RECUSE HIMSELF FROM A CASE IN WHICH HE HAS A PERSONAL VESTED INTEREST OR IN WHICH HE IS THE DEFENDANT.

This is a fundamental principle of fairness, which should need no discussion. A judge who owned stock in General Motors would recuse himself from hearing a case involving General Motors. In Chicago last summer, Cook County Circuit Judge Harold Siegan withdrew from a case involving night baseball in Wrigley Field, because his son had done legal work for the Illinois attorney general's office and his nephew is a deputy city corporation counsel (Washington *Post*, December 27 1984). If that constituted a conflict of interest, how much more involved are the members of this Court, who could lose ten million dollars if they rule against themselves as defendants?

Every judge has a vested interest in every case involving his own immunity. His vested interest is identical with those of the defendants in this case. Naturally he will dismiss such cases as "without merit."

I have made formal motions in both the US District Court and in the Fourth Circuit Court that the question of immunity be turned over to a neutral panel of inde-

pendent, distinguished citizens. I believe the Congress is such a body. If you feel the Civil Rights laws were un-wisely passed, you should lay your case before Congress and ask it to grant you immunity. Similarly, Congress is also the proper agency to initiate a constitutional change if you feel the present Constitution is defective.

Meantime, it would be manifestly unfair to sit in judgment of youselves.

A JUDGE WHO DOES NOT APPROVE OF THE CONSTITUTION AND THE LAWS AND TREATIES MADE UNDER IT, AND WHO PUBLICLY DECLARES THAT HE WILL NOT OBEY THEM, IS DISHONORING HIS OATH AND SHOULD, BOTH FROM CONSCIENCE AND PUBLIC DUTY, RESIGN FROM THE BENCH.

Again I am not trying to be clever. But the Constitution and the pertinent laws are so clear that judges must obey them, and *Pierson* is likewise so clear that judges will not obey them, that all judges are caught in a dilemma.

Last january we watched on television while the Chief Justice gave the oath to President Reagan to protect, uphold, and defend the Constitution. At that same moment, Mr Burger had a motion pending in a federal court, admitting violating the Constitution and the civil rights laws and claiming that, as a judge, he will not obey them!

(I assume the Chief Justice was unaware of the motion filed in his name. When I had tried to point out this contradiction to the U.S. attorney, I was told that he could not speak to me because I am not an attorney and therefore he would be putting me at a disadvantage. It is time that mature legal minds were brought to bear on

how most gracefully to extricate the defendants from the position their counsel has put them in.)

THE CONSTITUTION DOES NOT PERMIT JUDICIAL IMMUNITY; IN FACT, THE LAWS SPECIFICALLY FORBID IT. ANY RATIONALIZATIONS THAT THEY *SHOULD* SANCTION IT ARE THEREFORE IRRELEVENT. THEY ARE ALSO WRONG, AND HAVE BEEN SO LABELED BY THIS COURT.

Most members of this Court were appointed by Presidents Nixon, Ford, and Reagan, all of whom made clear that they were selecting men and women who would strictly construe the Constitution. As Justice John Paul Stevens says, "It is not our job to apply laws that have not yet been written" (New York Times, "Working Profile: John Paul Stevens, July 23, 1984).

Justice Sandra Day O'Connor specifically pledged before her Senate confirmation hearing that she would apply the Constitution as it is written and not as she would like it to be written.

I am in complete agreement with this philosophy.

The alternative to this is the "Judge Thornton doctrine," in which the laws written down on paper are of no consequence and the only law that applies is the one "up there in his head."

How often have I sat in court and heard judges lecture defendants on the importance of having laws in society and the necessity of living by those rules? Judge Selwyn Smith and Judge Richard Williams in particular have both been eloquent in delivering these homilies. Both then immediately turned around and declared that they themselves will not obey the law. Williams delivered his lecture be-

fore sentencing a marijuana dealer. I agree that selling marijuana is bad, but I believe that violating basic constitutional rights, which Williams admits having done, is even worse.

As Judge Chagrin told the 13-year old Mexican boy (Kates, *supra*): "If you can't observe the law, you have to be put away."

(Then-Governor Ronald Reagan put it more succinctly in a bronze plaque above his office door in Sacramento. It said simply, "Obey or Get Out.")

The "doctrine" of judicial immunity puts at least one law-breaker in every law court in America -- the judge himself. In the case of a criminal trial, it puts two, the judge and the prosecutor.

As Justice William Rehnquist told the Court in *Butz, supra*:

> The ultimate irony is that in the area of common-law official immunity, a body of law fashioned and applied by judges, absolute immunity within the federal system is extended only to judges and prosecutors. The cynical among us might not unreasonably feel that this is simply another unfortunate example of judges treating those who are not part of the judicial machinery as "lesser breeds without the law."

Actually, if I may disagree slightly, it is the judges and prosecutors who are "without the law" -- except that it is impossible to be outside a law which specifically applies to "every person."

(It is also ironic that the only persons who speak in court and do not take an oath to tell the truth are the judge and the attorneys. This Court should set the example for all other courts in America by

opening each session with the Justices reaffirming their oaths. The Chief Justice would then call all attorneys to the bar and administer their oaths to them).

No court has ever quoted the Constitution or the statue law as justification for granting immunity to itself. Instead, they have quoted only English common law, plus some rationalizations that are no more than excuses for not obeying.

Rationalizations are irrelevant.

They are also unnecessary. Judges of other major western democracies carry out their duties without immunity.

Finally, they are wrong. This Court itself has parried most of them in denying immunity to non-judges.

Let us take them up quickly in order.

Judicial independence:

This is the one most often cited. It argues in effect that only a judge who does not himself have to obey the law can be a good judge.

This sounds like the preacher who says he must be allowed to sin in order to save his congregation from sin.

As a federal judge wrote in *McAlester v Brown* (the old man who was locked up because he couldn't hear the judge, *supra*):

> Even though there may be an occasional diabolical or venal judicial act, the independence of the judiciary must not be sacrificed one microscopic portion of a millimeter, lest the fears of a section 1983 intrusion cow the judge from his duty.

Comments Professor Irene M. Rosenberg tersely:

This is "a rather unflattering estimate by judges of the courage and moral fiber of their colleagues" (64 Va L Rev 833, 1978).

Justice Brennan warned that absolute immunity will lead to severe abuses and asked:

"To what extent does fear of a suit actually inhibit officials?

"To what extent *should* it?"

As this Court ruled in *Robertson v Wegman,* (436 US 584, 1978), "the denial of absolute immunity is *intended* to affect behavior that threatens to violate constitutional rights" (emphasis added)

It added in *Carlson v Green,* (466 US 14, 1980):

> A clear benefit of qualified immunity (as opposed to absolute) is that improper conduct is deterred.

And it told Butz, *supra*:

> It is not unfair to hold liable the official who knows, or show know, he is acting outside the law. Insisting on an awareness sof clearly established constitutional limits *will not unduly interfere* with the exercise of official judgment (emphasis added).

Actually, in theory at least, judges are supposed to be deterred. Many run for election and reelection. They may be impeached. They are (theoretically at least) subject to discipline by some sort of inquiry and review procedure. They may be imprisoned for crimes on the bench. If judges must be, as they say, absolutely free from all restraints and deterrents, then these deterrents should be removed.

Why is the deterrent of civil suit different?

Because none of the other deterrents are effective. If they were, there would be no judicial misbehavior. (Three prosecutions of federal judges in over 200 years does not suggest a vigorous criminal deterrent.)

Furthermore, none of the other deterrents recompense the victim. A suit for damages, and only a suit for damages, will both deter illegal judicial behavior and repay the victim for the injury suffered.

In *Pulliam v Allen, supra*, the Court ruled that the victim's lawyers may be paid in a successful civil rights injunctive suit. But no redress is awarded to the victim.

Why?

The Public Good:

Judge Selwyn Smith used this argument in the suit against him for not permitting the defendant to mount a defense in court.

I cannot conceive of any circumstances in which fraud in court, violation of civil rights, and the many other egregious wrongs committed by judges in this case and in others can be construed as being in "the public good." No judge has ever quoted the public to the effect that judicial crimes are in the public good.

Quite the contrary. We, the people, said clearly what is in our good when we wrote the Constitution and when our elected representatives in Congress wrote the civil rights statutes. The public has never given judges immunity for its own good or for any other reason.

Appeal Makes Suits Unnecessary:

This rationale presents the spectacle of a judge, afraid to trust his case to the courts, insisting that his victim must subject himself to more judges' justice.

The present case is evidence enough that appeals judges are no more zealous than trial judges in respecting the law and the Constitution. As Judge Bryan said, irrelevently, in dismissing the fraud suit against the landlords whose attorneys admitted their conspiracy in Judge Thornton's court: "I will not go behind Judge Thornton's ruling, *even if it is wrong.*"

Fear of frivolous suits:

Perhaps the worst fear of judges is that loss of immunity would open them to unjustified and frivolous suits. But there has been no avalanche of such suits against governors and Cabinet officers since this Court denied immunity to those executives. Besides, this Court told Butz, *supra*, such cases "can be quickly dismissed."

A symnpathetic judge, such as Bryan, above, will bend every effort to protect fellow judge defendants. The best legal counsels in the country will rush to defend a judge, thus earning credits which they would hope to cash in their later appearances in court, while every attorney will flee headlong from arguing any suit against a judge, frivolous or serious, for fear of destroying his career. (Whether judges actually would wreak vengeance on such a lawyer is moot; the lawyers think they will, or at best are not sure. Why take the risk? Why does the Court think I am acting *pro se*?)

A citizen who sues a judge feels like the Washington Redskins arriving in Dallas for the big game against the Dallas Cowboys to find the referree, the umpire, the linemen, and the NFL president all wearing Cowboy uniforms. They'll be forced to play the games with the Cowboys' ball, by the Cowboys' rules, and with the Cowboys' officials.

And still the Cowboys are afraid!

Why do judges fear a trial in their own courts? Are they afraid they will not get justice there?

Or are they afraid that they will?

In 1949 Judge Learned Hand, in the case of the judge who had imprisoned an American citizen for 18 months as an alien (*Gregoire v Biddle, supra*), wrote that he would refuse to subject an innocent judge to the necessity of proving his innocence, and that he would rather leave wrongs unrighted than have the innocent threatened by a suit.

This is an amazing admissison by a famous jurist of his lack of faith in the American court system.

Why are innocent judges the only ones to be spared a suit? Why not innocent bank presidents, innocent auto mechanics, innocent school teachers, etc?

This Court rejected Hand's argument in 1959 when it ruled in *Barr, supra*:

> Such a burden (litigation) is hardly one peculiar to public officers.... But the way to minimizing the burdens of litigations does not generally lie through the abolition of a right of redress for an admitted wrong.

In *Nixon v Sirica,* (497 F.2d 700, 1974) a federal court called court hearings one

of "the routine legal obligations that confine all citizens.

Or, as this Court put it in 1980:

> The expense and disruption of defending itself, even if substantial, does not constitute irreparable damage.... The expense and annoyance of litigation is part of the social burden of living under government (*FTC v Standard Oil of California*, 449 US 244).

As Chief Justice Warren Burger put it in 1984:

> The fact that a given law or procedure is efficient, convenient and useful will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government. The framers ranked other values higher than efficiency.

The present suit has cost me ten years, many thousands of hours, and thousands of dollars to redress an egregious crime and violation of constitutional rights. My campaign to have the laws obeyed has aroused the anger of some 49 judges and lawyers, including the U.S. Attorney General and all nine members of the U.S. Supreme Court. One judge has threatened to throw me into jail for persisting. The present defendents have all (illegally) demanded that I pay an additional $2,000 as punishment. Does this suggest "frivolity"?

It is not frivolous suits that worry many judges, it is the threat of serious suits for real wrongdoing. As this Court

said in *Randall, supra,* immunity is to protect a judge who has erred; if he has decided rightly, he needs no protection.

Destroy respect for the judiciary:

Actually, the opposite is the case. Immunity flashes a green light to every judge that he may safely commit virtually any crime. Indeed, it can be argued that immunity attracts to the bench men and women who see almost unlimited opportunity for self-enrichment with almost total safety. Fixing traffic tickets is penny-ante crime. Judge Walter L. Nixon Jr of Mississippi has been accused of seeing and seizing larger opportunities than that, accepting oil and gas well leases in exchange for assisting a drug suspect.

The popular image of judges had been tarnished long before the revelations from Chicago and Mississippi. The stereotype of judges in such popular films as "Kramer vs Kramer" and "The Verdict," and the well publicized Gallup Poll of several years ago should sound a warning to the judiciary that it has a serious image problem.

Short-sighted judges speak naively of "an aura of deism" that surrounds the bench. But Justice Potter Stewart, writing in *Stump, supra*, warned:

> If aura there be, it is hardly protected by exonerating from liability such lawless conduct as took place here. And if intimidation would serve to deter its recurrence, that would surely be in the public interest.

It is now time for every judge to make a decision: Will he and she personally obey the law and the Constitution, which he has taken an oath to obey? There are

only two choices -- obey or disobey. There is no third option, such as being outside the law, which clearly includes "every person." Neither *Randall v Brigham* nor *Pierson v Ray* changed the law or the Constitution by one comma. They still read exactly as they did before the rulings were written.

Above the entrance to the Supreme Court, in letters large and bold, are chiseled the words

EQUAL JUSTICE UNDER LAW

They do not say "Equal Justice for Everyone Except Judges."

Chief Justice Burger applies two simple tests to every decision:

Is it right?

Is it fair?

Those two tests are commended to this Court in the present case.

As Benjamin Franklin wrote:

> For having lived long, I have experienced many instances of being obliged by better information or fuller consideration, to change opinions even on important subjects, which I once thought right, but found out to be otherwise.

In its previous rulings on judicial immunity, this Court has never quoted the Constitution. Whatever your decision in this case may be, will you quote the Constitution and the U.S. civil rights statutes as your basis?

Will you also quote your own decision, which you quote in every case when you deny immunity to others but have never quoted when granting it to yourself? I refer to *US v Lee* and your eloquent words that

No man in this country is so high that he is above the law. No officer of the law may set the law at defiance with immpunity. All officers of the government, from the highest to the least, are creatures of the law and are bound to obey it.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinions of the Eastern District of Virginia.

Respectfully submitted,
John B Holway
Pro Se

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JOHN B. HOLWAY
Plaintiff,

CIVIL ACTION
NO. 84-1058-A

V.
WARREN BURGER, et al.,
Defendants.

ORDER

This matter having come on for a hearing pursuant to the Motions of the defendants to Dismiss or for Summary Judgment and/or Sanctions, and no appearance of the plaintiff, and the Court after reviewing the defendants' Motions, the plaintiff's Opposition thereto, and for reasons stated in open court, it is accordingly

ORDERED:

(1) that plaintiff's Motion to Take Oaths is DENIED;

(2) that plaintiff's Motion to Disqualify Attorneys is DENIED;

(3) that Motions of the defendants to Dismiss are GRANTED, and plaintiff's Complaint is DISMISSED;

(4) that defendants' Motions for Sanctions are GRANTED, and the defendants shall file within 10 days of the entry of this Order an affidavit setting forth the fees and costs expended by them in defending this action, and the plaintiff shall have 20 days from the date of this Order to file an opposition;

(5) that the defendants' Motion for an Injunction is GRANTED, and the plaintiff John B. Holway is hereby permanently en-

joined from filing any action in this Court arising out of the 1978 action brought in the Prince William County Circuit Court by Holway against Jonathan England, the 1980 ction brought in the Prince William County Circuit Court by Jonathan England against Holway, or any of the several suits against the various judges and attorneys involved in Holway's claims and appeals from the decision in those cases without first obtaining leave of this Court. Leave of Court to proceed may be granted only upon Holway's filing with the Court a Motion seeking Leave to File accompanied by Holway's certification that the matter is brought in good faith and not for the purpose of harrassment.

Nothing in this Order shall be construed as having any effect upon John B. Holway's ability to defend himself in any criminal or civil proceeding brought against him or his ability to raise an appropriate counterclaim in any such civil proceeding. Furthermore, nothing in this Order shall be construed as denying John B. Holway access to the United States Court of Appeals.

(6) that the Clerk shall forward certified copies of this Order to all counsel of record and to Mr. Holway, pro se.

James C. Cachoris
United States
District Judge

January 25, 1985
Alexandria, Virginia

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JOHN B HOLWAY
Plaintiff,

v

CIVIL ACTION
NO. 84-1058-A

WARREN BURGER, ET AL.,
Defendants.

MEMORANDUM OPINION

This matter is before the court for an award of counsel fees and costs to the defendants. On January 25, 1985, this court granted defendants' Motions for Sanctions. Defendants have filed affidavits setting forth their requests and plaintiff has not filed any opposing brief within the time prescribed by the Order of January 25, 1985. This matter is now ripe for adjudication.

I.

This case has had a long history involving state courts, U.S. District Courts, the Fourth Circuit Court of Appeals, and the U.S. Supreme Court.

In 1978, plaintiff's suit over a commercial dispute was resolved against him in a state court.

In 1980, plaintiff was a defendant in the Circuit Court of Prince William County. Plaintiff sued the state judge who heard his case. That case was dismissed and the Virginia Supreme Court affirmed. The United States Supreme Court denied a writ of certiorari.

Plaintiff then filed suit in this court against the judge who heard the 1980 action. That suit was dismissed by Judge Bryan.

Plaintiff then filed a civil rights action naming the individuals involved in was dismissed by Judge Williams on October 26, 1982.

Plaintiff appealed and the Fourth Circuit Court of Appeals affirmed Judge Williams' decision on March 22, 1983. On October 3, 1983, a writ of certiorari was denied.

The instant suit names numerous federal and state defendants, alleging a violation of civil rights. It appears that anyone who had had contact with the plaintiff's lawsuits in the past are now named as defendants.

On January 25, 1985, this court dismissed plaintiff's Complaint, awarded defendants other relief, and granted defendants' Motions for Sanctions.

II.

Gregory Lucyk, Assistant Attorney General, has filed an affidavit on behalf of the state defendants requesting $1,330.00 counsel fees plus $97.00 in costs. After reviewing Mr. Lucyk's affidavit, I find the hourly rate of $95.00 per hour and the expenditure of 14 hours of time to be reasonable in defending this lawsuit. I further find that costs of postage, telephone, and travel to be reasonable. Therefore, the court will award the the defendants $1,330.00 counsel fees and $97.00 in costs for a total of $1,427.00

Dennis Szybala, Assistant United States Attorney, representing the federal defendants has filed an affidavit seeking $75.00 per hour and the expenditure of 11 hours to be reasonable in defending this lawsuit. Therefore, the court will award the federal defendants $825.00 in counsel fees.

An appropriate Order shall issue.

Dated: February 26, 1985
Alexandria, Virginia

James C. Cachoris
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
UNPUBLISHED

No. 85-1175

John B. Holway,

Appellant

versus

Warren Burger; Byron White; William Rehnquist, John Paul Stevens; Harry Blackmun; Lewis Powell, Jr.; William Brennan; Potter Stewart; Sandra Day O'Connor; Richard Williams; James M. Sprouse; Robert Chapman; John Butzner. Jr.; Edward Simpkins, Jr.; Lawrence W. I'Anson; Harry L. Carrico; Albertas S. Harrison, Jr.; George M. Cochrane; Alex M. Harmon, Jr.; Richard H. Poff; A. Christian Compton; William French Smith; Elsie L. Munsell; Thomas K. Berger; Gerald L. Baliles; Dennis G. Merrill; William L. Winston; Ernest W. Ballou; Montgomery Knight, Jr.; W. Thomas Rice and John R. Alford.

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cachoris, District Judge. (C/A No. 84-1058)

Submitted: May 31, 1985 Decided: June 28, 1985

Before RUSSELL, HALL AND MURNAGHAN, Circuit Judges.

(John B. Holway, Appellant Pro Se. Gregory E. Lucyk and William G. Broaddas, Attorney General's Office; Dennis Szybala, United States Attorney's Office, for Appellees.)

PER CURIAM:

John B. Holway seeks to appeal the district court's dismissal of his civil rights suit against numerous judges and government officials. In his complaint, Holway sought to recover $42,500 in compensatory damages and $10,000,000 in punitive damages. He also filed a motion requesting that the judges of this Court recuse themselves since three of the Court's members are named defendants in this matter. Because we find this appeal to be without merit, we deny Holway's recusal motion and affirm the judgment below.

This matter arose from two state court actions resolved against Holway in 1978 and 1980. Holway has since attempted to sue virtually all the judges and government attorneys who were involved in the original state proceedings and in the subsequent collateral challenges to those rulings. Holway filed the instant complaint in federal district court on October 9, 1984. Defendants responded by filing noting that a hearing was scheduled for January 25, 1985, at which they would move to dismiss the complaint and would request the imposition of sanctions against Holway. Holway filed a motion to disqualify the defense attorneys, and asked the court to open the January 25

hearing with a recitation of the formal judicial and professional legal oaths.

On January 25, 1985, the district court held the scheduled hearing to consider the various motions submitted by the parties. Holway failed to appear at the hearing, and the court subsequently denied his motions and granted those of the defendants. On February 20, 1985, Holway filed a timely notice of appeal. On February 25, 1985, the district court issued an order assessing against Holway $2252 in attorney's fees.

Upon review of the record, the district court's opinion, and all materials submitted by the parties, we conclude that the district court properly dismissed Holway's complaint. Accordingly, because the dispositive issues recently have been decided authoritatively, we dispense with oral argument and affirm the judgment below.

AFFIRMED.

APPENDIX D

Det Kongelige Justis- Og Politidepartement
Postboks 8005, Dep., Oslo 1

John B. Holway,
Research Associates,
7805 Chase Court, Manassas.
Virginia 22110,
USA

22.8.1983

LEGAL IMMUNITY IN NORWAY

We refer to your letter of 2 May 1983 sent to us by the Norwegian Bar association.

In Norway, as in Britain and France, a judge may be sued for actions on the bench if he has acted maliciously. He may even be sued if he has acted with severe imprudence.

By authority
/s/Jens-Sveinung Wegner
Head of Division

APPENDIX E

JUSTITSMINISTERIET
Copenhagen, 05-Sep. 1983

John B Holway
Research Associates
7805 Chase Court
Manassas Virginia 22110
USA

Dear Mr Holway.

Thank you for your letter concerning judicial immunity for judges....

A person who suffers damage because of a decision made by a judge while the judge was in service may sue the judge in a civil procedure with a claim for compensation. Judges are as well as other persons responsible according to the so-called "culpa"-rule (rule of fault and negligence). This implies e.g. that a judge normally won't be made responsible for wrong estimates. The action is brought before the ordinary courts.

Yours sincerely
/s/G.C. Duus

APPENDIX F

PORTUGUESE EMBASSY
Washington

February 9, 1984

Mr John B. Holway
7805 Chase Ct.
Manassas, VA 22110

Dear Mr. Holway:

With reference to your letter of April 22, 1983... we are pleasaed to inform that the Portuguese authorities have transmitted the following data in answer to your inquiry:

The Portuguese Constitution of 1976 contains the following provisions regarding judicial independence:

> The courts are independent and subject to the law only.
>
> Judges are irremovable and shall not be transferred, suspended, retired or dismissed except as provided for by law.
>
> Judges will not be held liable for their decisions except as provided for by law. (Article 221)

However, Portuguese law does specify some limitations on judicial immunity. Thus judges can be held criminally responsible for acts committed in a judicial capacity which are punishable under the Penal Code.

Civil case in which judges can be held liable for their actions are related in Chapter XI of the Portuguese Civil Code.

Article 1083 of the Code lists the following cases in which judges would be held responsible for payment of damages:

a. when a judged is convicted of the crime of bribery, subornation, embezzlement of public funds or prevarication;

b. when a fraud is perpetrated;

c. when such responsibilities are expressly imposed by law;

d. when justice has been denied.

Sincerely yours,
/s/P. Ribeiro de Menezes
Minister Counsellor

APPENDIX G

EMBASSY OF THE HUNGARIAN PEOPLE'S REPUBLIC
3910 Shoemaker Street, NW
Washington, DC 20008

April 29 1983

Mr. John B. Holway
7805 Chase Ct.
Manassas, Va. 22110

Dear Mr. Holway,

In answering to your letter concerning the question about judicial immunity in Hungary let me inform you that by the Constitution of the Hungarian People's Republic "the judge is independent, be subject only to the laws..." but if he acted maliciously the Supreme court may open a disciplinary action against him.

Sincerely,

/s/Consul for Hungary